The Central Law Journal.

ST. LOUIS, FEBRUARY 24, 1882.

CURRENT TOPICS.

The resolutions adopted by the Missouri Bar Association, on motion of Henry Hitchcock, Esq., of this city, on December 28th, 1881, and published in the CENTRAL LAW JOURNAL of January 13th, not only have attracted universal attention, but seem to have received, almost universally, the strongest approval. The New York *Tribune* republished them in full, editorially commending the plan therein set forth, and referring to Senator Davis' bill as the best plan yet submitted to Congress. The New York *Evening Post* has also referred editorially and with approval to these resolutions, and to the general scheme embraced in them; the New York *Times* and New York *Herald*, have also discussed the general subject with approval of the plan of intermediate appellate courts in the circuits, which is the essential feature of Judge Davis' plan. The New Orleans *Times-Democrat* has also published in full the Missouri resolutions, stating editorially that they accord generally with the views of the members of that bar. In the last number of the New Jersey *Law Journal* these resolutions are also noticed at length, the editor commending the plan therein suggested as being "in its general provisions the best that has been proposed." At the last annual meeting of the Illinois State Bar Association, held early in January, the plan proposed by Judge Davis, and also the resolutions adopted by the Missouri Bar Association, were referred to a committee, on whose report resolutions were adopted, also approving that plan, except as to minor details. Similar expressions of approval from individual members of the bar and bench from all parts of the country have been received in response to a circular sent out by John R. Shepley, Esq., of this city, as chairman of the Committee on Law Reform, of the Missouri Bar Association, in pursuance of a separate resolution adopted by said Association, instructing said committee to submit said resolutions to members of the profession elsewhere; a large number of letters having been received, all of which, we learn, with but two or three exceptions, heartily indorse the resolutions adopted here, many of them expressing very strongly the gratification of the writers that such action was taken by the Missouri State Bar Association.

Several bills are now pending in either House of Congress on this subject. In the Senate, Judge Davis' bill (originally introduced by him in 1877, and again in 1880,) was again introduced on December 12, 1881, and is now in the hands of the Senate Judiciary Committee. On January 26, Senator Miller, of California, introduced a bill prepared by Judge Sawyer, of California, also referred to the Judiciary Committee; and Senator Pugh has very recently introduced in the Senate the bill already presented by Mr. Manning in the House. In the House of Representatives, Mr. Manning's bill, to divide the Supreme Court into three sections of three jud es each, was introduced on December 6, 1881; on January 9, 1882, Mr. Payson, of Illinois, introduced a bill "to establish a Court of Appeals," which is a copy of Senator Davis' bill, with one or two additions of detail. On January 12, Mr. McCook, of New York, introduced a bill "to reorganize the judicial system of the United States," which was prepared by Judges Blatchford and Benedict, of New York. On Jan. 9, a bill was introduced in the House by Mr. Hardy, of New York, providing for the appointment in each circuit, of two associate circuit judges, and for holding in each circuit, at least twice a year, of two general terms of the circuit court, by the three judges thus provided for, for the hearing of all cases of appeal and error from district courts, and motions for new trial or rehearing in equity in the circuit court; which is in effect an adoption to that extent of the Davis plan of intermediate appellate courts. This bill, we understand, was in fact prepared by a select committee of the New York Bar Association. No report has yet been made by the Judiciary Committee of either House on this subject.

There are two distinct and opposing plans of relief presented by these several bills, besides the very elaborate and cumbrous plan of Judge Sawyer, which is an attempt to combine the Davis plan of intermediate circuit courts with a new and double-headed court of appeals in Washington City, with the Supreme Court increased to 18, and standing at

the top of them all. There is no reason to believe that this last will be seriously considered. With great respect for Judge Sawyer, we think that he underestimates the efficiency of Judge Davis' plan, which he indorses as far as it goes, and separately overestimates the amount of additional machinery really required.

The bill first introduced by Mr. Manning a year or two ago, proposed to increase the Supreme Court to 21 judges. His present bill abandons any attempt to increase the court,—very wisely, we think, both as to its expediency and probable success,—and simply proposes to classify the present 9 judges into three divisions, assigning to each division a particular class or classes of cases. The general features of Judge Davis' plan are familiar to our readers, being those advocated by the Missouri Bar Association. Judge Blatchford's bill is on the same general plan as Judge Davis,' in providing for intermediate appellate courts in the circuits, and not contemplating any change in the number or duties of the Supreme Court; but differs in some of its details.

We learn that the committee of the American Bar Association met in New York on the 3d inst., and after filling the vacancy caused by the untimely death of Mr. Clarkson N. Potter, by the appointment of Mr. W. M. Evarts, further and very earnestly considered and discussed the whole subject,—Mr. Evarts accepting the appointment and meeting with the committee. No result of their deliberations has yet been made public, but it is understood that this will be done before long.

We find no reason to change the strong expressions of approval already given by this Journal to the general features of Senator Davis' plan; and so far as Mr. Manning's bill is concerned, again heartily indorse the concluding sentence of the Missouri resolutions, which were as follows:

"Nor, in the opinion of this Association, would adequate or satisfactory relief be afforded to the Supreme Court by dividing it into sections or divisions, whether the number of judges thereof be increased or not; such a plan being open to grave constitutional objections, besides being likely to impair the dignity and efficiency of the Supreme Court itself, and not likely to afford any but temporary assistance."

And we are convinced that the western bar generally concur in these objections to that plan as altogether unanswerable.

NOTICE OF UNRECORDED DEED TO SUBSEQUENT PURCHASER OR ATTACHING CREDITOR.

II.

One of the most prominent of the circumstances which have been held to imply notice of an unrecorded deed is the possession of the property by the grantee under it. "If," says Judge Trowbridge, at an early period in Massachusetts,[1] "one seized in fee of land for a valuable consideration, by deed, bargains and sells the land to another in fee, and the deed gives the bargainee possession, and when he enters by force of that right, he is then possessed of the land, and complete tenant in fee; and such entry being followed by a visible improvement of the land, and taking the profits thereof, is such an evidence of the alteration of the property as will amount to implied notice thereof." In a New York case[2] the court says: "Whatever is sufficient to make it his duty to inquire as to the rights of others, is considered legal notice to him of those rights. Here the person, to whom the unregistered deed was given, was in the actual possession of the premises at the time of the sheriff's sale, and this was good constructive notice to the subsequent purchaser to make it his duty to inquire as to the rights of the person in possession." [3]

"It is said in Fair v. Stevenot,[4] in entire harmony with the current of authority, that the open, notorious and exclusive possession of a purchaser, holding under an unrecorded deed, is sufficient to put a subsequent pur-

1 3 Mass. 581.

2 Tuttle v. Jackson, 6 Wend. 213; 21 Am. Dec. 314.

3 See, to the same effect, Colby v. Kenniston, 4 N. H. 262; Norcross v. Widgery, 2 Mass. 508; Newman v. Chapman, 2 Rand. 93; 14 Am. Dec. 766; Eyre v. Dolphin, 2 Ball & B. 301; Forbes v. Denniston, 2 Bro. P. C. 425; Knox v. Thompson, 1 Litt. 350; 13 Am. Dec. 246; Jaques v. Weeks, 7 Watts, 261; Griswold v. Smith, 10 Vt. 452; Taylor v. Lowenstein, 50 Miss. 278; Tucker v. Vandermark, 21 Kan. 263; Weld v. Madden, 2 Cliff. 584; Tunnison v. Chamblin, 88 Ill. 378; Vaughn v. Tracy, 22 Mo. 415; s. c. 25 Mo. 318; Page v. Waring, 76 N. Y. 463. Possession, however, it should be noted, is evidence of implied notice only. Vaughn v. Tracy, 22 Mo. 415; s. c. 25 Mo. 318. Where actual notice of the unrecorded conveyance is required by statute, as in Massachusetts and Maine, possession and cultivation of land and fencing it, by a party who has an unrecorded deed therefor, is not sufficient to warrant the inference that a third person had any notice of such deed. Pomroy v. Stevens, 11 Met. 244.

4 29 Cal. 490.

chaser upon inquiry as to the title of the person in possession, and that notice of the unrecorded deed should be found from such possession, unless it appears that the inquiry has been diligently prosecuted, but without success. The doctrine of constructive notice implied from possession, springs from the apparent, not the true, relation that the person in possession bears to the title. It proceeds upon appearances, and the presumptions arising therefrom. The person in possession is presumed to be rightfully so; and the subsequent purchaser, finding a person in the apparent possession, is charged by the law with the duty of inquiring by what right or title he holds. The ground upon which the holder of the unrecorded conveyance is permitted to prevail over a subsequent purchaser, who had recorded his conveyance according to the statute, is that it was fraudulent in him to take and register a conveyance to the prejudice of the known title of another. And as fraud will not be presumed, but must be proven, the notice, whether actual or constructive, of the unrecorded conveyance, must be clearly shown before the exception established by the courts to the registration act will be permitted to prevail. Inquiry does not become a duty where the apparent possession is consistent with the title appearing of record. The subsequent purchaser can not be said in such case to have either neglected or refused to make inquiry for a title not appearing of record, for none was suggested by the apparent possession, and, therefore, for his failure, he can not be adjudged guilty of fraud. Where the vendor is in apparent possession, the subsequent purchaser finding the title of record in the vendor is put upon no further inquiry, because the possession appears to be according to the title; and if, at the same time, another person is also in possession, there is no presumption of title in him inconsistent with that found in the vendor."[5] Although the effect of possession of land by the grantee in an unrecorded deed is to put a subsequent purchaser upon inquiry as to the condition of the title, it has never been held that the presumption arising from it is a conclusive one.[6] And in some cases, the existence of this presumption has been so pertinently questioned, that it is impossible to consider the subject as free from doubt. Say the Rhode Island Court: "Is such possession, then, presumptive notice? The doctrine of presumptive notice must proceed upon the ground that it is the duty of the second purchaser to inquire for the title elsewhere than at the registry; for no man would be presumed to have that knowledge which we might be able to prove that he had not, unless as the consequence of the neglect of some duty; and still less where the further presumption is to be made of a fraudulent design. It might be well asked, upon what ground the holder of an unrecorded deed can impute to one who has inquired for the deed at the place where the holder is required by law to lodge it, a fraudulent design to injure him. Is it because he has omitted to inquire of the holder if he were neglecting a duty which the law had imposed upon him as a condition of his title, and save him from the consequences of such neglect? Did the statute intend the registry as a convenient mode merely of obtaining such information as individuals might choose to lodge there? Or did it design to make it the duty of the grantee to lodge his deed there at his peril, or to do that which was equivalent, and see that the purchaser had in some other way such notice as the registry should give?"[7] What are the necessary characteristics of such a possession as will be sufficient to charge a subsequent purchaser with notice of the change, which has occurred in the title, is a question of law upon which there is but little conflict in the authorities, though it is difficult to put into language the result of the various cases in such terms as will be equally apt when applied to each. "The possession must be actual, distinct and unequivocal. It must, moreover, be visible, and manifested by notorious acts of ownership, such as would naturally be observed and known by others."[8] "Where the purchaser, under an

[5] Smith v. Yule, 31 Cal. 180, 183, per Rhodes, J See also Thompson v. Pioche, 44 Cal. 516; Mechan v. Williams, 48 Pa. St. 238; Wickes v. Lake, 25 Wis. 71, 95; Lestrade v. Barth, 19 Cal. 660; Doyle v. Teas, 5 Ill. 202; Vaughn v. Tracy, 22 Mo. 415; Landes v. Brant, 10 How. 348; Rogers v. Jones, 8 N. H. 264; Coburn v. Breckenridge, 48 Ill. 91; Colby v. Kenniston, 4 N. H. 262.

[6] Nutting v. Herbert, 37 N. H. 346; Harris v. Arnold, 1 R. I. 125; Rogers v. Jones, 8 N. H. 264.

[7] Brayton, J., in Harris v. Arnold, 1 R. I. 136.

[8] Coleman v. Barklew, 27 N. J. L. 359.

unregistered conveyance, is in the open visible possession of the premises, it is deemed sufficient notice to protect him against a subsequent purchaser, and to charge the latter with knowledge of his title."[9] Though the making of valuable improvements by the person in possession is a circumstance strengthening the presumption of title which arises from possession, still it is not essential that the improvements should be valuable so long as the possession is actual and visible.[10]

"Every possession will not amount to implied notice," says the New Jersey court, in Holmes v. Stout.[11] "It must be an actual and exclusive possession, manifested by notorious acts of ownership, such as would naturally be observed and known by others. Merely cutting wood or pasturing cattle on unin-closed woodland, repairing the fences, and even removing an old house standing on part of the land, which may be regarded as mere acts of trespass as well as of ownership, have been held insufficient."[12] A mixed and ambiguous possession will not amount to notice.[13] Yet, where a husband and wife, who had long occupied a farm, conveyed it to their son, taking back a mortgage, conditioned for their support, but omitted to have their mortgage recorded, and the mortgagees still remained on the premises, they and the son constituting one family, and all contributing to its support; and, some years after the giving of the first mortgage, the son made a second, to a third person, which was duly recorded, it was held that the second mortgagee, under the circumstances, should be regarded as having had notice of the legal title of the first mortgagees, at the time of the conveyance to him.[14] In Rogers v. Jones,[15] the New Hampshire court said: "It may well be doubted whether possession can be regarded as furnishing notice of a title acquired after the possession commenced, unless it be coupled with undoubted acts of ownership, such as the erection of buildings, although in Allen v. Anthony,[16] it seems to have been held that mere possession was constructive notice of a title acquired after the date of the possession."[17] And in another case the court said, *obiter*: "Suppose that a lessor should grant the fee of the land to the lessee, he being in possession under the lease, and the next day should make a second grant to a third person, who well knew that the lessee the day before was in possession under the lease, how does his continued possession furnish evidence of notice of his purchase? To imply notice in such a case is to presume a fact, without proof and against probability."[18] And in the New Hampshire case of Emmons v. Murray,[19] where it appeared that the occupant had been in possession a number of years without any title, and, after having acquired one, continued in as before, and without any change in the mode or character of his occupancy, either by improvements, increasing the value of the land or otherwise, the court said: "We think it plain that occupation under these circumstances can afford no indication of a claim of title so as to place a second purchaser upon his guard, or to raise the imputation of fraud against him for taking a conveyance of the same party, under whom the occupant has acquired a title. It had no tendency to put the party upon inquiry, even if such notice were sufficient in a case where the law has established a registry as the proper source of information concerning the title. Upon a parity of reasoning where one holds and is in possession of certain rights in a tract of land by a deed which is recorded, and has certain other rights by a deed which is not recorded, his possession will not be notice of a title or claim beyond what he holds under the deed which is recorded.[20] From these cases it would seem to follow that the pregnant circumstance which gives rise to the implication of notice, is the change of possession rather than fact of possession itself.[21]

9 Rupert v. Mark, 15 Ill. 540. See Troup v. Hurlburt, 10 Barb. 354; Taylor v. Lowenstein, 59 Miss. 278, Phillips v. Pitts, 78 Ill. 72.

10 Phillips v. Pitts, 78 Ill. 72.

11 10 N. J. Eq. 419.

12 See also Patten v. Moore, 32 N. H. 382; Ely v. Wilcox, 20 Wis. 523; Truesdale v. Ford, 37 Ill. 210.

13 Bell v. Turlight, 22 N. H. 500,

14 Boggs v. Anderson, 50 Me. 161. And see Clark v. Morris, 22 Ill. 434; Weld v. Madden, 2 Cliff. 584.

15 8 N. H. 271.

16 1 Meriv. 282.

17 Citing McMechan v. Griffing, 1 Pick. 156; Newhall v. Pierce, 5 Pick. 450; Hewes v. Wiswall, 8 Green, 98; Davis v. Blunt, 6 Mass. 487; Prescott v. Heard, 10 Mass. 63; Boynton v. Reed, 8 Pick. 329.

18 McMechan v. Griffing, 3 Pick. 149; Holmes v. Stout, 10 N. J. Eq. 428.

19 16 N. H. 398.

20 Great Falls Co. v. Worster, 15 N. H. 414.

21 Butler v. Stevens, 26 Me. 484. But see Matthews v. De Merritt, 22 Me. 312.

Or what amounts to the same thing, if the possession is consistent with the recorded title, it will not raise the presumption of notice.[22]

The possession of the tenant being in law the possession of his landlord, it has been held that the possession of the tenant is notice of the landlord's title.[23]

In several of the States it has been provided by statute that notice to a subsequent purchaser, in order to invalidate a prior unrecorded deed, must be *actual* notice; that implied or constructive notice is insufficient.[24] Under such circumstances, it becomes important to determine what is actual notice, an inquiry no less difficult and perplexed than the question we have been considering, viz: What is notice, generally? In Curtis v. Mundy,[25] it was said that it "is not required to prove that the party claiming under a subsequent deed or attachment, had certain knowledge of the deed from the debtor to the party claiming under it." Such notice as men usually act upon in the ordinary affairs of life would be sufficient. In Spofford v. Weston,[26] the doctrine was laid down that the fact of the registry of a deed to a piece of land, from one stranger to another, would not charge a subsequent purchaser from the actual owner with notice that the grantor in such deed had received an unregistered deed from such actual owner; and further, that evidence that the subsequent purchaser had made declarations indicating his disbelief that any prior deed had been given by his grantor, though admitting his knowledge of the claim that such a deed existed, by those who professed to hold under it, would give rise to no presumption of *actual notice* of the deed. Nor is possession on the part of the grantee in the unregistered conveyance sufficient to constitute *actual notice* to the subsequent purchaser.[27]

Under the general principle that notice to the agent is notice to the principal, it has been held that where a party effects a purchase through the means of an agent, he will be charged with notice of a prior unrecorded conveyance of which notice was received by the agent, whether communicated by him to his principal or not.[28] Where plaintiff's attorney in attachment proceedings, where the attachment is levied upon real estate is aware of the existence of a previous unrecorded deed to it, that fact is sufficient to charge the plaintiff with notice of such deed.[29] Notice to a partner is notice to his copartners, where the notice is of an unrecorded deed as of other matters.[30] Notice to the husband, however, when a conveyance is made to him and his wife, is not notice to his wife of a prior unregistered mortgage, especially where she pays the whole of the consideration for the conveyance out of her separate estate.[31] And, where a director of a corporation makes a mortgage to it of property which he had already conveyed by a deed which is unrecorded, the company will not be charged with notice of the facts within his knowledge because of his relation to it as director.[32] And where a person, without authority, assumes to act for another in making a purchase or levying a process in his behalf, that other can not avail himself of such unauthorized action by ratification, without accepting the consequences of notice of any facts which may have been within the knowledge of such volunteer agent. Thus, in a very peculiar case, an owner of land conveyed it by deed duly executed and acknowledged, and on the next day gave a deputy sheriff a letter directed to an attorney and containing a demand against himself, directing him to open it because of the absence of the attorney, and to make a writ upon the demand and attach the land which had thus been conveyed; all this was done, and the execution subsequently issued was levied upon the land; the court held that if the creditor would avail himself of the act of the grantor in causing the land to be attached, he must be charged with his knowledge of the conveyance which he had made.[33]

In the early Virginia case of Newman v.

[22] Smith v. Yule, 31 Cal. 180.
[23] Landers v. Bolton, 26 Cal. 394.
[24] Mass. Rev. Sts., ch. 59, sec. 28; Me. Rev. Sts., ch. 91, sec. 26.
[25] 3 Met. 407.
[26] 29 Me. 140. See, also, Rich v. Roberts, 48 Me. 548.
[27] Pomroy v. Stevens, 11 Met. 244: Mara v. Pierce, 9 Gray, 308; Parker v. Osgood, 3 Allen, 489; Dooley v. Wolcott, 4 Allen, 406.
[28] Goodenough v. Warren, 5 Sawy. 501; May v. Bone, 12 Cal. 91; Haywood v. Shaw, 16 How. Pr. 119.
[29] Polk v. Cosgrove, 4 Biss. 437.
[30] Watson v. Wells, 5 Conn. 468.
[31] Snyder v. Sponable, 1 Hill (N. Y.), 567.
[32] La Farge Ins. Co. v. Bell, 23 Barb. 54.
[33] Hovey v. Blanchard, 13 N. H. 146.

Chapman,[34] it was held that the doctrine of *lis pendens*, where the litigation was a suit for foreclosure of an unrecorded mortgage, would not operate to raise a presumption of notice to a subsequent purchaser without notice. Says COALTER, J., in that case: "What sort of notice? Undoubtedly such as would affect the conscience of the purchaser; otherwise, the act would be no safeguard of the innocent, as it was intended to be. A mere *lis pendens* is not such notice as that."

An important exception to the main rule of our subject, which it is proper to notice before closing this article, is found in Louisiana. The court there has said: "The theory that notice is equivalent to registry in relation to conveyances of real property, we do not understand to have been adopted in our jurisprudence."[35] "The only cases in which there has been any exception to the effect of registry of conveyances, are those of gross fraud on the part of subsequent purchasers."[36]

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[34] 2 Rand. 93; 14 Am. Dec. 766.

[35] Toulane v. Levison, 2 La. Ann. 789; cited with approval in Poydras v. Laurans, 6 La. Ann. 771; and Moore v. Jourdan, 14 La. Ann. 414.

[36] Poydras v. Laurans, 6 La. Ann. 773; citing Splane v. Micheltree, 2 La. Ann. 265; McGill v. McGill, 4 La. Ann. 269. As to the application of a different rule to the registry of titles to personal property, under the peculiar practice in that State, see Smith v. Lambeth, 15 La. Ann. 566.

SALES OF GOODS BY PARTIES LACKING TITLE.

A topic of ever-recurring interest is the consideration of the ramifications of title to movable chattels of every description. Lying at the bottom of all transactions in personal property, are a number of maxims which concern the transfer of the title to goods and chattels. Like most maxims, they have their limitations and restrictions, but have not lost their force or vogue. One is of constitutional potency: That no one can be divested of his property except by his own consent or by operation of law. This bars the way of tortious takers of the goods of another. Another oft-cited maxim is, that no one can confer a better title than he has; *nemo plus juris ad alium transferre potes quam ipse habet.*[1] This is the phrase of the civil law, which has been adopted by the common law. The more general phase of the reasoning is, that no one can give what he does not possess. "*Nemo dat quod non habet.*" [2]

The idea has been reiterated in the form, "No one can sell a right when he himself has none to sell;" and it has been declared that this is a proposition so self-evident that argument can not elucidate or strengthen it.[3]

Hence the general rule is stated to be, that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller has, and no other or greater.[4]

As recently declared in England, the settled and well known rule of law may be thus expressed: The purchaser of a chattel buys subject to what may turn out to be certain infirmities in the title. If he does not purchase in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who professed to sell it, the purchaser will not obtain a title.[5]

The same view prevails in the United States, except that here the exemption in the case of sales in market overt is not recognized.[6] But the exposition thus given should cover, not only lost and stolen chattels, but also those which have been acquired by trespass instead of theft; those which a bailee has converted to his own use, or to that of his friend or employer, and all those to which title is wanting. This is true, however long the chain of transfers, and however involved and intricate an investigation may be required before the seller's lack of title is discovered. For instance, the title to personal property may often depend on that of real property, as in the case of annexations to the soil. The right of the seller of such annexations to dispose of them as chattels may rest upon

[1] Broom's Leg. Max. 452.

[2] Per Willes, J., in Whistler v. Foster, 14 C. B. (N. S.) 248.

[3] Fawcett v. Osborn, 32 Ill. 425.

[4] Barnard v. Campbell, 55 N. Y. 460.

[5] Per Cairns, J., in Cundy v. Lindsay, 3 App. Cas. 463.

[6] See authorities cited later.

the result of a suit in ejectment, or to quiet title.[7] And in such cases, deeds and title papers may be read in evidence in replevin.[8] Again, the complications of the title to the goods may arise from the number of hands through which they have passed, and the provisions and conditions of the documents of transfer.

To enter more minutely into the rule and its apparent exceptions, it should be first noted that the general principle is, that only the owner, or his authorized representative can, as a seller of goods, convey a valid title to the purchaser.[9] But the goods need not be in the actual possession of such owner or his delegate; they may be in the possession of a third person, who wrongfully withholds them; and the sale, in such cases, is not a sale of a right of action, but it is a sale of the thing itself.[10] This is illustrated by the case where the defendant, in an action which was never prosecuted to judgment, but in which property had been attached and sold by the sheriff, who held the proceeds, sold and assigned to plaintiff the property and the proceeds. It was held that there had been a transfer to the plaintiff, not merely of a *chose* in action, on which he could sue in defendant's name, but of the property in the proceeds, and that it was the deputy sheriff's official duty to deliver the proceeds to the plaintiff.[11]

Under the rule stated, a buyer of lost o stolen goods, who, in ignorance of the lack of title of his vendor, re-sells them to a third party, is liable for conversion to the true owner. His good faith does not supply the want of a valid title, and the original owner can maintain trover against him.[12] So it has long become settled that an auctioneer, who receives and sells stolen goods, not knowing they were stolen, nor having reason to believe so, and delivers the proceeds to the thief, is liable in trover to the true owner without a demand.[13] The same is true of a broker who sells upon commission stolen stocks brought to him by a stranger.[14] Negotiable instruments constitute in this, as in other cases, an exception to the usual rules as to the transfer of personal property. Hence, it has recently been held that an action for the conversion of interest coupons of United States bonds can not be maintained, by the owner from whom they have been stolen, against a person who has received them as an agent, for exchange, in good faith and without gross negligence, from a party to the theft, and has transferred them by delivery and paid the proceeds to his employer, without benefit to himself, and without any demand or notice.[15]

But a distinction is drawn between a seller of stolen goods and a mere naked bailee, who does no act to convert them to his own use, and has no such intention to withhold them from the owner, and who, before any demand is made upon him, delivers them back to the person from whom he received them. In this

7 McMahon v. Graver, 3 U. C. C. P. 365; Marshall v. Beebey, 53 Ind. 83; Porter v. Bright, 82 Pa. St. 441.

8 Wells on Repl., sec. 80.

9 Illustrations of this principle may be found in the cases cited from the following States: Massachusetts—Stanley v. Gaylord, 1 Cush. 536; Gilmore v. Newton, 9 Allen, 171; Risey v. Boston Note Co., 11 Cush. 11; Chapman v. Cole, 12 Gray, 141; Scinder v. Shaw, 2 Mass. 398; Bearce v. Bowker, 115 Mass. 129; Moody v. Blake, 117 Mass. 23. Maine—Parsons v. Webb, 8 Greenl. 38; Galvin v. Bacon, 2 Fairf. 28; Prime v. Cobb, 63 Me. 200. Vermont—Riford v. Montgomery, 7 Vt. 408; Courtis v. Cone, 32 Vt. 232. New Hampshire—Bryant v. Whitcher, 52 N. H. 158. New York—Barrett v. Hill, 3 Hill, 348; Williams v. Merle, 11 Wend. 80. Illinois—Klein v. Seibold, 89 Ill. 540. Missouri—Wilson v. Crockett, 43 Mo. 218. The same doctrine is sustained in England—Whistler v. Foster, 32 L. J. C. P. 545; Pier v. Humphreys, 2 Ad. & E. 161. According to the Code Napoleon also, the sale of another's property is a nullity.

10 Case of The Brig Sarah Ann, 42 Sumn. 211, per Story, J.; Hubbard v. Bliss, 12 Allen, 590; Carpentier v. Neale, 8 Gray, 157; Cartland v. Morrison, 32 Me. 190; Webber v. Davis, 44 Me. 147. See also Time v. Dubois, 6 Wall. 554; Boynton v. Millard, 10 Pick. 166; First Nat. Bank of Cairo v. Crocker, 111 Mass. 163; Hassel v. Borden, 1 Hilton, 128; Zabriskie v. Smith, 3 Kernan, 322.

11 First Ward National Bank v. Thomas, 125 Mass. 278.

12 See the following cases besides those cited in the note on transfers by the owner: Hoffman v. Carew, 20 Wend. 21; s. c. 22 Wend. 285; Beazly v. Mitchell, 9 Ala. 180; Roland v. Grindy, 5 Ohio, 212; Dame v. Baldwin, 8 Mass. 502; McGrew v. Browder, 12 Martin (La.), 17; Browning v. Magill, 2 Harr. & J. 308; Heckle v. Lurvey, 101 Mass. 344; Breckenridge v. McAfee, 54 Ind. 141. According to these cases the owner may maintain trover against the seller of stolen goods, although such owner has not prosecuted the thief, and this view also prevails in England; see White v. Spettugue, 13 M. & W. 603; Lee v. Bayes, 18 C. B. 599; Crane v. London Dock Co., 5 B. & S. 313.

13 Hoffman v. Carew, 20 Wend. 21; s. c. 22 Wend. 285.

14 Bercich v. Marye, 9 Nev. 312.

15 Spooner v. Holmes, 102 Mass. 503.

category comes an innkeeper who thus redelivers a stolen horse. He is not regarded as guilty of a conversion, although he knew that the animal was stolen.[16]

But it is otherwise if the bailee of stolen goods sells them, though in good faith; and in such a case he can not escape liability to the true owner for their value.[17]

Furthermore, according to the stricter view, the same liability attaches to the buyer of stolen goods as to the seller, and, however innocent or remote the purchaser may be, he is liable, without demand,[18] for conversion of the goods.[19] The liability is still clearer if there be some other exercise of dominion by the purchaser, as if he refuses to restore the property on demand,[20] or lets to a third person a stolen horse which he bought in good faith,[21] or commits a double conversion by selling the property, as previously noted.

Yet it has lately been held that a purchaser at private sale, in good faith, of a certificate of mining stock, issued to the registered owner, and duly indorsed by him, acquires a good title against the owner, and is not liable in conversion for refusing to redeliver the certificate on demand, although such certificate had been really stolen by such apparent owner; and this, not upon the ground that such certificates were strictly of a negotiable character, but upon the authority of cases which declare them so far on the footing of negotiable instruments that execution purchasers of corporate stock would have been protected, if they bought without notice that the registered owners had hypothecated the stock.[22]

The English exception to this rule in the case of a purchase in market overt, embracing sales in those open shops, or fairs, where, by custom, buyers could obtain an unassailable title to stolen property, has never been adopted in this country.[23] Indeed, it has been distinctly repudiated in the States in which the question has arisen, which comprise New York,[24] Pennsylvania,[25] Maine,[26] Massachusetts,[27] Vermont,[28] New Hampshire,[29] Maryland,[30] Ohio,[31] Illinois,[32] and Indiana.[33]

Many efforts have been made to have the courts declare the doctrine of sales in market overt applicable to sales of chattels under execution. But all these efforts have been without success. With unvarying unanimity the rule has been sustained that a sale of chattels, under a writ against one person, can have no operation upon the title of another person. Hence the purchaser is always liable to a suit brought by the true owner.[34] Even in England, sales in market overt have been subjected to many restrictions to insure good faith,[35] though in theory this was considered as sufficiently secured by the character of these markets, where those who had lost property by theft or otherwise could be present and make known their loss, while every assurance of fair dealing was supposed to be given by the publicity of the transaction.[36] Yet, within a recent period, the exemption

16 Loring v. Mulcahy, 3 Allen, 575.

17 Kramer v. Faulkner, Mo. Ct. of App., May 4, 1880 (not yet reported).

18 Stanley v. Gaylord, 1 Cush. 536; Galvin v. Bacon, 11 Me. 28.

19 Breckenridge v. McAfee, 54 Ind. 141; Parham v. Riley, 4 Cold. (Tenn.) 9; Sharp v. Parks, 48 Ill. 511; Galvin v. Bacon, 2 Fairf. 30; Robinson v. Skipworth, 23 Ind. 311. But, in the United States, he can sue the vendor on his implied warranty of title, if such seller was in possession of the goods. See Shattuck v. Green, 104 Mass. 42; Morris v. Thompson, 85 Ill. 16.

20 Barrett v. Warren, 3 Hill, 348.

21 Gilmore v. Newton, 9 Allen, 171.

22 Winter v. Belmont Manfg. Co., 53 Cal. 428.

23 Ventress v. Smith, 10 Pet. 176.

24 Wheelwright v. Depeyster, 1 Johns. 480; Hoffman v. Carew, 20 Wend. 21; s. c. 22 Wend. 285; Mowrey v. Walsh, 8 Cow. 238.

25 Hosack v. Weaver, 1 Yates, 478; Harvey v. Metzger, 2 Yates, 347; Easton v. Worthington, 5 Serg. & R. 130.

26 Coombs v. Gordon, 59 Me. 111.

27 Southwick v. Hamde'l, 2 Dane Abr. 286; Dame v. Baldwin, 8 Mass. 521; Towne v. Collins, 14 Mass. 500.

28 Heacock v. Walker, 1 Tyler, 341; Griffith v. Fowler, 18 Vt. 390.

29 Bryant v. Whitcher, 52 N. H. 158; Nixon v. Brown, 57 N. H. 34.

30 Browning v. Magill, 2 Harr. & S. 308.

31 Roland v. Gundy, 5 Ohio, 203.

32 See Fawcett v. Osborn, 32 Ill. 411.

33 See Robinson v. Skipworth, 23 Ind. 311.

34 Freeman on Executions, sec. 335, citing (besides several of the cases first mentioned) McClanahan v. Barrow, 27 Miss. 664; Chambers v. Hemis, 28 N. Y. 454; Fanant v. Thompson, 5 B. & Ald. 826; Buppum v. Deane, 8 Cush. 41; Shaw v. Tunbridge, 2 W. & Bla. 1064; Stone v. Ebberly, 1 Bray, 317; Champney v. Smith, 15 Gray, 512; Shearick v. Huber, 6 Binn. 2; Symonds v. Hall, 37 Me. 354; Austin v. Tilden, 14 Vt. 327; Hornesby v. Hague, 4 Jones, 381; Williams v. Miller, 15 Conn. 144; Bartholomew v. Warren, 32 Conn. 102.

35 See Crane v. London, etc. Dock Co., 33 L. J. Q. B. 224.

36 Fawcett v. Osborne, 32 Ill. 426.

has been held inapplicable to sales by sample;[37] to sales of horses at auction at repositories outside the ancient limits of London;[38] and to all sales made in the interval,[39] before the thief's conviction, which was formerly a pre-requisite to the maintenance of trover or other civil action against the thief or his transferees. But this pre-requisite was not extended to sales made out of market overt, so as to protect all innocent buyers of stolen goods,[40] and of course never was recognized in the United States.[41] But even where the exemption attaches, it is invoked for the benefit of innocent purchasers, and can not be claimed by the seller of stolen goods, though he had disposed of them in the utmost good faith; and hence such a seller is liable to the original owner.[42]

The rules as to stolen goods apply also to lost chattels. Indeed, it is familiar doctrine that a finder of lost goods may be guilty of larceny by retaining them; but when, is not easily ascertained. According to the latest statement of the English doctrine, which, it is declared, generally prevails in this country, if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner can not be found, it is not larceny. But if he takes them with like intent, though lost, or reasonably supposed to be lost, but reasonably supposing that the owner can be found, it is larceny.[43] In the latter case, a sale by the finder can, of course, convey no title whatever. In the former case, such a sale can convey a title valid against all except the owner of the goods,[44] or possibly the occupant of the premises where they were found.[45] The doctrine that the owner may recover lost property from a purchaser thereof in good faith, has been applied to incorporeal chattels. Thus, where a mining corporation issues to an owner of shares of stock a certificate transferable on the books of the company by indorsement and surrender of the certificate, and he indorses the same and then loses it, and it comes into the hands of a *bona fide* purchaser for value, such purchaser acquires no right to the stock. The decision is based upon the ground that certificates of stock are not negotiable securities in a commercial sense, but are mere evidence of the holder's title to a given share in the property and franchises of the corporation.[46] The thief or finder of goods lacks the owner's consent or authority to a sale, and hence can convey no title; and the same is true of a trespasser, whether he acquires possession by force, fraud (unless successful in inducing a sale to him), accident or mistake. Of course, robbery stands on the same footing as larceny, and where chattels are thus obtained, their transfer can confer no title upon any subsequent purchaser.[47] But the more important instance of seizure is that by an officer making an illegal levy upon goods. Thus a purchaser acquires no title to property which he buys at sheriff's sale, unless it belongs to the judgment debtor. A purchaser of the goods of one person at a sale on execution, or attachment against another, is liable to the real owner in trover, if such buyer takes the goods.[48]

The same rule applies to a sale of personal

[37] Crane v. London Dock Co., 33 L. J. Q. B. 224; affirming Hill v. Smith, 4 Taunt. 532. See Town Commrs. v. Woods, Ir. R. 11 C. L. 506.

[38] Lee v. Bayes, 18 C. B. 599.

[39] Horwood v. Smith, 2 T. R. 150.

[40] White v. Spittigue, 13 M. & W. 603, which overruled Gimson v. Woodfall, 2 C. & P. 41; and Peer v. Humphreys, 2 Ad. & E. 495, and followed Stone v. Marsh, 6 B. & C. 551, and Marsh v. Keating, 1 Bing. N. C. 198, and was itself confirmed by Lee v. Bayes, 18 C. B. 599. See, also, Wells v. Abraham, L. R. 7 Q. B. 554.

[41] Hoffman v. Carew, 22 Wend. 285.

[42] Ganly v. Ledwidge, Ir. R. 10 C. L. 33.

[43] See Crim. Law. Mag. for March, 1880. See, also, the curious case of Felton v. Gregory, S. C. Mass., Jan., 1881, 11 Reporter, 301.

[44] See the cases cited in next note; previous references to sales in market overt are, of course, applicable to lost chattels.

[45] The superior right of the occupant of the premises is maintained in McAvoy v. Medina, 11 Allen, 541; Lawrence v. State, 1 Humph. 228; and in the recent case of Hamaker v. Blanchard, Penn. Supreme Ct., noted Feb. 12, 1881, 15 Am. L. Rev. 291. The casual finder's rights are preferred in Bridges v. Hawkesworth, 7 E. L. & Eq. 424; and see Menny v. Green, 7 M. & W. 623.

[46] Sherwood v. Meadow Valley Mf'g Co., 50 Cal. 412. But compare Winter v. Belmont Mf'g Co., 53 Cal. 428, previously cited, and limiting the above case.

[47] Parkham v. Riley, 4 Cold. (Tenn.) 9.

[48] See the following cases in addition to those cited in connection with markets overt: Johnson v. Babcock, 8 Allen, 583; Sanborn v. Kittridge, 20 Vt. 640; Boggs v. Fowler, 16 Cal. 559; Arendale v. Morgan, 5 Sneed (Tenn.) 713. In England, however, the rule seems to be otherwise, unless the process is void on its face. See Farrant v. Thompson, 5 B. & A. 826; Lock v. Letwood, 1 Q. B. 736.

property exempt from seizure by creditors.[49] The courts have also settled the liability in trover of *bona fide* purchasers claiming through a sale by trespassers, of severed earth, logs, wood, wild berries and posts used to fence the line of a railroad.[50] Nor is there any distinction, if the property be taken by mistake,[51] or if the possession be fraudulently obtained,[52] unless the title was also transferred.[53] So, no title is transferable where the owner intrusts personal property to a bailee for a special purpose, and the latter makes an unauthorized sale.[54] The fact that the bailee has the privilege of purchasing does not augment his title.[55]

There has been much conflict of authority as to the effect of a further sale by a party who himself obtained possession of goods under a sale made subject to a condition precedent, as payment, security or other preliminary requirement. These doubts arose as to sales for cash on delivery, or for credit on the installment plan; or where there was any other mode of reservation of the title, as by a provision that the bill of sale should not be given until full payment was made. It was formerly considered that in such cases, whatever the character of the transaction as between the parties, a *bona fide* purchaser takes a good title, and this view has recently been reiterated in Pennsylvania.[56] But it seems now to be generally established that no title is gained even by a *bona fide* purchaser.[57] Good faith does not aid the purchasers from the vendees in such cases, because their vendors, having no title to the property, could convey none.

It will be seen that in all instances the test is, in whom does the title to the goods inhere? and that the answer to this question must govern the rights of transferees, except in those cases in which creditors may intervene directly for fraud, or assignees of bankrupts may impeach a title valid between the immediate parties.

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[49] Paxton v. Freeman, 6 J. J. Marsh. 234; Cooper v. Newman, 45 N. H. 339; Williams v. Winter, 16 Conn. 143; Truman v. Swart, 4 Lans. 263; so, if after illegal sales, Wheelwright v. Depeyster, 1 Johns. 471; Wells v. Raglan, 1 Swan. 501; Miller v. Thompson, 60 Me. 322; Harris v. Saunders, 1 Strobh. Eq. 300.

[50] Riley v. Boston Water Power Co., 11 Cush. 11; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; Whitman G. & S. Mf'g Co. v. Tuttle, 4 Nev. 494; Freeman v. Underwood, 66 Me. 229; St. Louis, etc. R. Co. v. Kaulbrumer, 59 Ill. 152.

[51] Williams v. Merle, 11 Wend. 80; Chapman v. Cole, 12 Gray, 141.

[52] Parker v. Dinsmore, 72 Pa. St. 427.

[53] Old Dominion S. S. Co. v. Bieckhardt, 31 Gratt. 683.

[54] Thus a pledgee may assign his interest, but a sale by him, without restriction, is a conversion, and gives no title. Bailey v. Colby, 34 N. H. 29; but see question in Talty v. Freedman's Savings Bank, 93 U. S. 321. And, so, if a factor, without statutory power, sells in violation or distinct excess of instructions, or for his own use: Hass v. Damon, 9 Iowa, 589; but see Sargent v. Blunt, 16 Johns. 74. So of sales by other bailees who have no such right: Riford v. Montgomery, 7 Vt. 411; Donald v. Arnold, 28 Tex. 97; Sanborn v. Colman, 6 N. H. 14; Heacock v. Walker, 1 Tyler, 338; Gilmore v. Newton, 9 Allen, 171; Roland v. Gundy, 5 Ohio, 202; Tinnen v Crugger, 40 Barb. 633; Saltus v. Everett, 20 Wend. 267; Buckmaster v. Mower, 21 Vt. 204; Wooster v. Sherwood, 25 N. Y. 278; Newcomb Buchanan Co. v. Baskett, 14 Bush. 658; Stanley v. Gaylord, 1 Cush. 536; Hartop v. Moore, 3 Ark. 44; Covill v. Hill, 4 Denio, 323; Hyde v. Noble, 13 N. H. 494.

[55] Chamberlain v. Smith, 44 Pa. St. 431; Sargent v. Gile, 8 N. H. 325; Burroughs v. Bayne, 5 H. & N. 296; Galvin v. Bacon, 2 Fairf. 28; Grant v. King, 14 Vt. 367; Hart v. Carpenter, 24 Conn. 427. But an option to purchase if the party likes, is essentially different from an option to return a purchase if he should not like. In the one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return. Hunt v. Wyman, 100 Mass. 198.

[56] Stadtfield v. Huntsman, Penn. Supreme Ct., Jan., 1880, 24 Alb. L. J. 185; Brunswick v. Hoover, Penn. Supreme Ct. Nov., 1880, 24 Alb. L. J. 186. See, also, to like effect, Much v. Wright, 46 Ill. 488; Hervey v. R. I. Locomotive Works, 93 U. S., and compare Merryford v. Davis, 102 U. S. 235.

[57] In New York the case of Wait v. Green, 36 N. Y. 556 (which followed Smith v. Lynes, 5 N. Y. 41, and Crocker v. Crocker, 31 N. Y. 507, and receives support in Vaughn v. Hopson, 10 Bush, 340), so far as it is an authority to the contrary may be regarded as practically overruled by the succeeding cases of Ballard v. Burgett, 40 N. Y. 314, and Austin v. Dye, 46 N. Y. 500. Comer v. Cunningham, 77 N. Y. 391, is the latest case on the subject in that State. The view first stated is also sustained by the cases cited in the following States: Massachusetts.—Coggill v. New Haven R. Co., 3 Gray, 346; Hushborn v. Canny, 98 Mass. 149. Maine.—Hotchkiss v. Hunt, 49 Me. 213. Connecticut.—Hout v. Carpenter, 124 Conn. 427. Vermont.—Clark v. Wells, 45 Vt. 4. North Carolina.—Clayton v. Hester, 80 N. C. 275. Mississippi.—Ketchum v. Brennan, 53 Miss. 596. Ohio.—Sanders v. Keeber, 23 Ohio St. 630. Illinois.—Jennings v. Gage, 13 Ill. 610. Iowa.—Baker v. Hall, 15 Iowa, 277. Michigan.—Couse v. Tregent, 11 Mich. 65; Fifield v. Ebner, 25 Mich. 48. Missouri.—Griffin v. Pugh, 44 Mo. 326; Little v. Page, 44 Mo. 412. California.—Putnam v. Lamphier, 36 Cal. 151; Kohler v. Harps, 41 Cal. 455; Cardinell v. Bennett, 52 Cal. 476; Maglee v. Eddy, 53 Cal. 597. Alabama.—Fairbanks v. Eureka Co., 2 South. L. J. 465 (Aug.-Sept., 1881). Oregon.—Singer Mf'g Co. v. Graham, 8 Oreg. 17. Wisconsin.—Hunter v. Warner, 1 Wis. 141. Indiana.—Shireman v. Jackson, 14 Ind. 459.

WILL — ESTATE UPON CONDITION — JUS DISPONENDI.

GILES v. LITTLE.

Supreme Court of the United States, October Term, 1881.

A testator devised and bequeathed all the property of which he should die seized to his wife, "the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike." *Held*, that, under this will, the widow took a life-estate, subject to be divested upon her ceasing to be a widow, with power to convey the life-estate only.

In error to the Circuit Court of the United States for the District of Nebraska.

This was an action brought in the Circuit Court of the United States for the District of Nebraska, for the recovery of lot No. 6, in block 54, in the City of Lincoln.

The following are the material averments of the petition: "On June 10, 1869, and thence up to his death Jacob Dawson was seized and possessed of diver real and personal estates of great value, and had a wife named Edith J., and six children who were on said day minors, and some very young, and all without any property whatever, his wife being seized and possessed in her own right of real and personal estates of the value of $10,000, and over. On said day, the said Jacob made his last will and testament, which contained the following sole bequest: After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to-wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers, with full power, right and authority to dispose of the same, as to her shall seem meet and proper, so long as she shall remain my widow; upon the express condition, that, if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike; and in case any of my children should have deceased, leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Edith J., to be executrix of this my last will and testament. On the 22nd day of June, 1869, the said Jacob died at Lancaster County in this district, leaving him surviving his said wife and six children. The said will was duly proved and admitted to probate in the proper court of said county, and letters-testamentary thereon were issued out of said court to the said Edith J., who took upon her the execution of said trust. The personal property, whereof the said Jacob died possessed, was duly inventoried and appraised at $958; and among the real estates whereof, at his death, the said Jacob was seized, was that certain piece or parcel of land, known and described as follows: Lot number 6, in block 54, in the City of Lincoln, in said Lancaster County, except six inches off the entire east line of said lot, which supports the east party wall of said lot; which lot is of the value of $5,000 and over. On the 27th day of April, 1870, the said Edith J., by her certain deed of conveyance, dated on said day, and duly executed and acknowledged, conveyed the said premises to one Cody, by warranty deed, which contained no reference to nor recited the power in said will, and a copy of said deed is hereto annexed, marked "A," and made a part of this petition; and by divers mesne conveyances from said Cody, the said defendant Little claims and pretends that he is seized in fee of said premises; and he is now in possession thereof by the defendant May, as his tenant. On or about the 15th day of November, 1879, the said Edith J. intermarried with one Pickering. One of the said children of the said Jacob died intestate without issue; and the survivors, being in indigent circumstances, have joined in a conveyance of the said premises, bearing date September 15, 1869, and duly executed and acknowledged, whereby they conveyed the same in fee to one Burr and one Wheeler, who by their deed have duly conveyed the same to the plaintiff. And by reason of the premises the said plaintiff has become and is seized in fee of said premises above described, and is entitled to the immediate possession thereof; the defendant, under the alleged title derived to him as aforesaid, unlawfully keeps the said plaintiff out of possession thereof."

There was a general demurrer to this petition, which the circuit court sustained, and gave judgment for the defendants. This action of the court is assigned for error.

Mr. Justice WOODS delivered the opinion of the court:

The contention of the plaintiff in error is, that Edith J. Dawson took, under the will of her deceased husband, Jacob Dawson, an estate for life, subject to be determined in case she contracted another marriage, with remainder to the heirs of Jacob Dawson; and that the power of disposal conferred on her by the will was only co-extensive with the estate which she took under the will, that is to say, the power was granted her to dispose of her life estate, and, consequently, that the estate conveyed by her deed to Cody determined upon her marriage with Pickering.

It was said by this court in Clark v. Boorman 18 Wall. 493, Mr. Justice Miller delivering its opinion, that "of all legal instruments, wills are the most inartificial, the least to be governed in their construction by the settled use of legal technical terms, the will itself being often the production of persons not only ignorant of

law, but of the correct use of the language in which it is written. Under the state of the science of law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of as much assistance as the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself."

If we apply the methods thus indicated to the construction of the will of Jacob Dawson, there can, it seems to us, be no serious doubt about its meaning. According to the averments of the petition, it appears that twelve days before his death Dawson executed his last will. At that time he was the owner of some real estate, and of personal property of the value of $958. He was the father of six living children, all of whom were minors, some of them very young, and all without any property in their own right. His wife, Edith J. Dawson, was the owner of real and personal property to the amount of $10,000 or more.

The promptings of natural affection would lead a testator so situated to provide in his will, not only for his wife, but also for his infant children. The disposition of his property is made by a single sentence in his will. It seems clear that his purpose was to give his wife an estate for life in his property, subject to be divested on her contracting a second marriage, and on the determination of the wife's interest, either by death or marriage, then an estate in fee to his children. No man unversed in technical rules of construction can, it seems to us, read this will without coming to this conclusion. To hold otherwise would be to suppose the testator, in drafting his will, was governed by abstruse rules of law in regard to the effect of its expressions, of which, it is probable, he never heard and had not the slightest conception. The clause of the will which disposes of the testator's entire estate provides first for the payment of his lawful debts. The residue of his estate (after payment of debts) is then disposed of as follows: "To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to remain and be hers, with full power, right and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow." This part of the disposing clause of the will is not open to doubt. The phrase, "so long as she remains my widow," refers to and qualifies the estate granted, as well as the power of disposition. The clear and undoubted meaning of the sentence is that, as long as the devisee remains the widow of the testator, his property, real and personal, shall remain and be hers, with full power to dispose of the same. This construction, so far as it concerns the estate granted, is so obvious that no discussion can make it any plainer. How large an estate the widow was empowered to dispose of, will be considered hereafter.

But the testator, not satisfied with this unequivocal declaration of his purpose, and to leave no doubt of his intention, and to give direction to his property when the estate of his wife therein should determine, proceeds to add: "Upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain should [shall] go to my surviving children, share and share alike." It would be hard to express more clearly the purpose of the testator to devise to his wife an estate during her widowhood, and on its determination a remainder in fee to his children.

The contention, however, of the defendants in error is, that the testator by this will gave to his wife an absolute estate in fee simple, with power, so long as she remained his widow, to dispose of it absolutely.

We find no warrant for this construction of the will, either in its terms or in the circumstances which surrounded the testator. The language is plain that the devisee was to take a life estate, subject to be determined on her second marriage, with a limitation over to the children of the testator. His purpose was clearly expressed, to provide for his children as well as his widow, to give the latter all his estate as long as she remained his widow, but to put it out of her power to disinherit his children. According to the construction of the defendants in error, the will gave her the power of absolute disposition during her widowhood, so that she could by her conveyance entirely divert the estate from his children; and having done this, could contract a second marriage without the loss of any interest in the proceeds of the property devised to her by the testator.

We think it was not the purpose of the testator to devise an estate in fee to his wife. As already remarked, the devise was limited by the words "so long as she shall remain my widow." But even if these words were wanting, the limitation over to his children in case she should marry again, would control and restrict the preceding words by which the estate was granted. The case of Smith v. Bell, 6 Pet. 68, is in point. The will construed in that case declared: "I give to my wife, Elizabeth Goodwin, all my personal estate, whatsoever and wheresoever, and of what name, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath to my wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely, the remainder of said estate to be for the use of said Jesse Goodwin," son of the testator, mentioned in an earlier part of the will; "and I do hereby constitute and appoint my said wife, Elizabeth Goodwin, sole executrix of this my last will and testament." The court held that this was a devise to the testator's wife for life, with remainder to his son, Jesse Goodwin. Chief Justice Marshall, in delivering its opinion,

said: "It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate to the wife, or which would more clearly express that intention. But the testator proceeds: The remainder of the said estate to be for the use of the said Jesse Goodwin. These words give the remainder of the estate, after his wife's decease, to the son with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. * * * * The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them." This case establishes conclusively the contention of plaintiff in error, that the words of the will under consideration, granting an estate to the wife, grant only an estate for life, and not an estate in fee simple. But it is contended by defendants in error that there are words in the last clause of the will which imply an absolute power of disposition, and give to the children only what may remain undisposed of in the wife's hands at the termination of her estate. The clause is, "if she should marry again, then it is my will that all the estates herein bequeathed, or whatever may remain, shall go to my surviving children, share and share alike." The contention rests upon the words, "or whatever may remain," and is, that they imply that a part or all of the estate might be absolutely disposed of by the wife during her widowhood. If the purpose of the testator in the disposition of his property is what the other parts of the will clearly indicate, then these words can not be construed to change that purpose. They can have operation without giving them that effect. The testator was seized of real estate and possessed of personal property. Both were included in the devise to the wife, and she was to have the enjoyment of both during her widowhood. The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to the children of the testator a remainder in the real estate, and whatever of the personalty was not consumed by the widow during her widowhood. This construction is warranted by the language of this court in Smith v. Bell, 6 Pet. *supra*, which was as follows: "This suit is brought for slaves, a species of property not consumed by the use, and in which a remainder may be limited after a life estate. They composed a part, and probably the most important part, of the estate given to the wife, 'to and for her own use and benefit and disposal absolutely.' But in this personal property, according to the usual condition of persons in the situation of the testator, there were trifling and perishable articles, such as stock on a farm, household furniture, the crop of the year, which would be consumed in the use, and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator when he employed the strong words of the bequest to her." This passage shows that, in order to carry out the evident purpose of the testator, general words which are applicable to property of different kinds may be restricted to property of a particular kind. For instance, that the phrase "or whatever may remain," in the will under consideration, may be limited to personal property only, though used in a sentence which applies to both real and personal estate. On this subject the case of Green v. Hewitt, decided by the Supreme Court of Illinois, 12 Cent. L. J. 58, is precisely in point. The will in that case provided as follows: "Second. After payment of such debts and funeral expenses, I give and bequeath to my beloved wife the farm on which we now reside; also my personal property of every description so long as she remains my widow, at the expiration of that time the whole, or whatsoever remains, to descend to my daughter, M. T."

The court held that under this devise the widow did not take a fee, and said: "The use of that expression (whatsoever remains) is of no vital significance, and can not be permitted to override the clearly expressed intention that the widow should take a life estate only." The next position of the defendants in error is that, even conceding that the will gives the widow of testator an estate for life, yet it conferred on her during her widowhood the power to convey the entire estate in fee, and she having so conveyed, the defendants in error who claim under her have a good title. But the authorities are adverse and show that when a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power is intended.

Thus, in Brandt v. Virginia Coal and Iron Co., 93 U. S. 326, the words of the will were: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death." By virtue of this power, the widow undertook to convey the fee of the land. But this court, speaking by Mr. Justice Field, said: "The interest conveyed by the devise to the widow was only a life estate. The language admits of no other conclusion; and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with such property in such manner as she might choose, consistently with that estate, and perhaps without liability for waste committed. The words used in connection with a conveyance of a leasehold estate, would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal

the words confer is limited by the estate with which they are connected." See, also, Bradley v. Wescott, 13 Ves. jr. 445; Smith v. Bell, 6 Pet. *supra*; Boyd v. Strahan. 36 Ill. 355.

It is next insisted by the defendants in error, that the statute of Nebraska, according to which the will must be construed, favors the construction contended for by them. The statute declares "every devise of land, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate." General Statutes of Nebraska, sec. 124, chap. 17. We are at a loss to see how the statute supports the view of one party to this suit, more than the other. According to the construction of the plaintiff in error, the devise vested in the widow of the devisor a life estate, remainder in fee to his children; according to the construction of defendants in error, it vested the fee in the widow. By either construction the devise conveyed all the estate of the devisor in the property devised. This is all the statute demands.

Lastly, it is claimed by the defendants in error that it is the settled rule that where a devisee, whose estate is undefined, is directed to pay debts, the devisee takes an estate in fee. The rule has no application here; for, as we have seen, the estate of the devisee and executrix is clearly defined. A direction to pay debts can not enlarge it. The case of Smith v. Bell, 6 Pet., *supra*, is precisely in point against the application of the rule to this case.

We have no doubt about the true construction of this will. Edith J. Dawson took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only. Her estate in the land, and that of her grantees, determined on her marriage with Pickering.

The judgment of the circuit court must, therefore, be reversed, and the cause remanded to that court, with directions to proceed in the case in conformity with this opinion.

BENEVOLENT ASSOCIATIONS — PAYMENT OF DEATH BENEFIT TO ADMINISTBATOR.

WORLEY v. NORTHWESTERN MASONIC AID ASSOCIATION.

United States Circuit Court, District of Iowa.

Where the contract between a benevolent aid association and its individual members is for the payment, upon the death of a member, of a sum of money to his devisees, and such member dies intestate, the administrator is not entitled to recover such amount from the association.

The plaintiff in his petition states that Phillip H. Worley, deceased, died on or about the 22d of October, 1880, intestate, and that the plaintiff is the duly appointed administrator of his estate; that the defendant is a corporation organized and existing under the laws of Illinois; that among the papers of decedent, were two policies or certificates issued by the defendant, whereby the defendant agreed and contracted to pay to the devisees of said decedent within thirty days after receiving evidence of said Worley's death, certain sums of money to be arrived at and computed from the number of members, in the division of which the decedent was constituted a member of said association by such certificate, at a sum certain for each member of the respective class in such division.

The plaintiff avers that he fully performed all covenants and conditions on his part; that satisfactory proofs were made to the company of the death of Phillip H. Worley; that the amount due in the aggregate upon the two certificates is the sum of $6,299.55, and that the defendant refuses to pay the plaintiff the amount due upon said policies or contracts.

The defendant for answer states that it is not a life insurance company, nor a corporation for pecuniary profit; that it is organized for benevolent purposes solely, under the provisions of the statute of Illinois, approved April 13th, 1872, as amended by an act approved March 28th, 1874, and providing for the organization of corporations, not for pecuniary profit, by three or more persons making, signing or acknowledging, and filing in the office of the Secretary of State a certificate stating the name and the title by which said corporation, or society, or association, shall be known in law; the particular business and objects for which it is formed, etc. That the defendant has no capital stock, and that its sole object and purpose, as declared in its certificate, is to procure pecuniary aid to the widows, orphans, heirs and devisees of the deceased members of said association; that by said act under which the defendant was organized, it is provided that "associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and where no annual dues and premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies;" the business of insurance not being one for the carrying on of which corporations can, by the terms of said act, be organized; that the defendant is an association such as is described in the act of March 28th, 1874, no annual dues or premiums being paid, or required to be paid, by its members, and no money or profits paid or contemplated to be paid to them; that the benefits arising from membership in said association accrue solely to the widows, orphans, heirs or devisees directly for their own sole benefit, and are not part of the estate of such deceased member or payable to his administrator; that the benefits

arising from the membership of said Phillip H. Worley in said association, as shown by the certificate set forth in the petition, are payable to his devisees, and not to other persons; and that said plaintiff, as administrator of the estate of said Phillip H. Worley, is not entitled to receive the same. Defendant avers that it has not knowledge or information sufficient to form a belief whether said Phillip H. Worley died intestate, and submits that the grant of letters of administration on his estate to the plaintiff would not bind the devisees or legatees of the last will of said deceased if such will should be proved to exist, nor would a payment to plaintiff as administrator protect the defendant from liability to such devisees or legatees, if any such should prove to be.

The defendant exhibits with his answer a copy of the articles of incorporation and by-laws of the association.

The plaintiff demurs to the defendant's answer, and the case is before us upon the demurrer.

E. F. Richman, for the plaintiff; *Putnam & Rogers*, for the defendant.

This action, in both form and substance, proceeds upon a breach of contract. The contract is contained in the certificates, copies of which are exhibited with the petition. The certificates provide that, for certain considerations therein mentioned, flowing from Phillip H. Worley, deceased, the association promises and agrees to pay to the devisees of said decedent certain sums of money therein specified. In order to maintain the action, the plaintiff must allege and show a breach of the contract. What breach has the plaintiff assigned? What breach can he assign? He has not alleged that the defendant association has failed, neglected or refused to pay to the devisees of the decedent the sums of money in question. This could not be alleged or shown, because the plaintiff has himself stated that there are no devisees in existence. The breach upon which the plaintiff must rely is the non-payment of the money to him as administrator of the decedent's estate. But is this a breach of the stipulations of the contract? The contract is not that the defendant company shall pay to the decedent in his life time or to the administrator of his estate at his death. The contract could not have made such a provision, since it would have been utterly repugnant to the whole purpose, scope and design of the association, as provided in the very law of its existence. Would a contract by the defendant to pay money to the decedent during his life, or to the administrator of his estate at his death, have been valid under the second article of the incorporation, providing that the business and object of the association is to secure pecuniary aid to the "widows or orphans, heirs and devisees of the deceased members of the association?" In the present case, the contract is, by its express terms, to pay to the devisees. Was it any breach of this contract not to pay to the administrator of the estate? Would it have been a breach to have refused payment to the widow, orphans or heirs of the deceased?

The stipulation entered into by the members of this benevolent or charitable association, was to pay money in certain proportions to the devisees of the decedent; that is, to such person, or pertons, as he should appoint by his will to receive the money. It so happens that he died without appointing any beneficiary of his bounty. Is it any breach of the stipulation not to pay to the widow, or the orphans, or the heirs, or to the creditors of the decedent? Neither the decedent nor the defendant corporation intended by this contract to provide for the widow, heirs, orphans or creditors of the decedent. The expression of one thing excludes other and different things; the designation of devisees in the contract excludes the other classes—the heirs, widow, orphans and creditors—who will undertake without violence to the known meaning of words to say that the word "devisees" in this contract can be construed to mean, directly or indirectly, the widow, or orphans, or creditors? But if the administrator shall receive the money due upon this contract, it will go through his hands to one, or all, of these classes of beneficiaries.

Indeed, I see no escape from the conclusion that, if the administrator shall collect the money, it must go primarily to the decedent's creditors. The only ground upon which the administrator can enforce payment is that the money belongs as assets to the decedent's estate. He surely can not collect the money as representative of the widow, orphans or heirs-at-law, and for their exclusive benefit; since in making a contract for the payment of money to "devisees," the decedent clearly excluded the other classes for whose benefit alone he could have contracted according to the articles of incorporation. Since then the administrator must, if he collects the money at all, proceed upon the ground that it is assets of the estate, it is clear that the creditors must be first satisfied —a result manifestly inadmissible. No one surely will seriously contend that the creditors of the decedent are entitled to payment out of the fund in question.

Why the decedent did not by will appoint some beneficiary—some devisee—to receive his bounty under the contract in question, we know not. He was himself a Mason and a member of the benevolent association represented by the defendant corporation. He may, in making the contract, have had in contemplation some individual whom he purposed to make the object of his bounty, and he may have changed his mind with respect to the object of his intended bounty. He may have made up his mind that his associates should not be called upon to contribute the sums required to fulfil the contract which he had entered into with the corporation. At all events, he died without appointing by will any one to receive the money, and the only presumption we can indulge in is, that he intended not to do what

he omitted to perform. Can we presume without proof that he failed to appoint devisees as contemplated by the contract in consequence of carelessness or inadvertence? Is negligence to be presumed?

If B stipulates with A upon a consideration flowing from A, to pay money to C, how must A, suing B upon the contract, assign the breach? Must he not allege the non-payment to C as the breach of the contract? Would it not be a fatal variance to assign the non-payment to A as the breach of the contract? And A dying, must not his administrator, suing at law to enforce the contract, allege the breach to be a non-payment of the money to C? The contract providing that the money be paid to C, the administrator would certainly fail on the ground of variance, if he assigned as a breach of the contract non-payment to any party other than C. So in the present case the administrator must assign his breach to be the non-payment to the decedent's devisees, as required by the contract. To meet this difficulty, the complainant's counsel suggested in the oral argument the analogy between a note payable to the order of the payee and the present case. Suppose the payee should die without making the order appointing the party to whom payment should be made, would his administrator be precluded from maintaining his action upon the instrument? Certainly not; but the difficulty with this argument is that there is no real analagy between the two cases. A note payable to the order of the payee is, to all intents and purposes, in legal effect, payable to the payee himself. The note becoming due, the payee may sue upon it in his own name and recover judgment. He need not assign or indorse it, or in any other way order the note to be paid to any third person. But in the present case it was not the legal effect of the contract that the money was payable to the decedent in his life-time. He could have maintained no action at all upon it. What the very contract provided was that the money should, after his death, be paid to such persons as he should by will appoint to receive it. This was its legal effect, as evidenced by its express words; and the question is, can the administrator step in and enforce it contrary to its legal effect? Can he sue upon the contract, alleging it to be payable to any one except the decedent's devisees? And if he should recover the money, can he pay it out in distribution to any one but the devisees of the decedent?

Since the argument of this case at the bar, the question of the right of an administrator to sue in a case like the one now before us has been before the Supreme Court of Iowa, in the case of McClure v. Johnson, 10 N. W. Rep. 217.

In this case the Supreme Court decided that the money due upon such a policy does not belong to the estate of the decedent as assets; that the only person who has any interest in it, and who can sue for it, is the beneficiary; and that the executor can maintain no action, the estate not being entitled to the money. The court further holds that the Code, secs. 2372 and 1182, "contemplates a case when the policy of insurance is payable to the deceased or his legal representative," and not when it is payable to another person for the use and benefit of such person. The court distinguishes this case from Kelly v. Mann, Ibid. 211.

In that case, say the court, the money received from the insurance company was assets belonging to the estate, and being such, it was held under the statute that it should be inventoried and disposed of according to law.

Suppose a devisee had been appointed by the decedent, would not payment to him be good? Would not his acquittance be a valid discharge of the obligation to the defendant? And in such case, could the present administrator maintain an action upon the contract to recover the money from the devisee as assets belonging to the estate? This was the very point decided in McClure v. Johnson. It was there held that such an action could not be maintained, because the money due was not assets belonging to the estate.

And so in the case before us the action can not prevail, because the administrator has no title to the contracts sued on, either by operation of law or by express terms of the instruments. If he had the legal title to the *chose in action*, and if its proceeds when collected were assets belonging to the estate, he could maintain a suit for the money in whosever hands found.

Demurrer to answer overruled.

NEGLIGENCE — PASSENGER LEAPING FROM TRAIN.

L.——, ETC. R. CO. v. BANGS.

Supreme Court of Michigan, January 18, 1882.

Mere anxiety on the part of a passenger to reach his home and to save others' distress on account of his absence, will not relieve him from the imputation of negligence in leaping from a moving train, for the purpose of getting off at a station where it should stop, but does not do so. It is not necessarily negligence to take a choice of risks, but it is negligence to peril life or limb merely to avoid inconveniences.

Error to Lenawee.

Weaver & Weaver, for plaintiff in error; *C. A Stacy*, for defendant in error.

CAMPBELL, J., delivered the opinion of the court:

Bangs recovered judgment for injuries from a railway accident suffered in October, 1880, at Tecumseh. He had taken a ticket to Adrian and back on a train which was not a regular one, but used on that occasion for an excursion to attend a political meeting. The train left Clinton during the day, taking on plaintiff at Tecumseh, and returned from Adrian between eleven and twelve o'clock at night. The train stopped at the cro

ing of the principal street, about a quarter of a mile south from the station, where a large number of passengers got off. It then started again and passed the station without stopping, and without any notice to passengers. Bangs, supposing it would stop, got up and went upon the platform in front of his car, which was the second car, counting from the rear end of the train, and discovered that the train was passing the station and would not stop there. He got down on the lower step on the side away from the station, and after going on a short distance jumped off, and was thrown down so that his right foot was crushed, and he was otherwise badly hurt, so as to require the amputation of his right leg, in addition to other injuries of a grave character. His explanation of the transaction was that he was confused by discovering the failure of the train to stop, and that he supposed that the train was not running more than six miles an hour, because that was its allowed rate through the village. He supposed he could jump safely. The night was not moonlight nor very clear, but he knew the ground, and the place where he jumped was a level place between two tracks, which were about eight feet apart.

The chief defense was contributory negligence, although exception was taken to some rulings concerning the negligence of the railroad. There is no dispute about the cause of the injury. It was caused by Bangs jumping from the moving train, which was moving at six miles or upwards per hour. Bangs not only contributed to it, but was an active cause of it; and the question is whether his action was negligent, or whether it was justifiable as not negligent. If there can be any doubt concerning the negligent character of such conduct, he was entitled to go to the jury upon it. He claims that persons frequently with impunity get on and off from cars in that way while under motion, and that the failure to stop at the station, and his anxiety about the feelings of his mother in case of his failure to reach home, disturbed him and led to hasty action.

We have reluctantly felt ourselves compelled to hold that, in our judgment, such conduct is beyond any question negligence, and that the jury should have been so instructed. The fact that many persons take the risk of leaving cars in motion does not make them any the less risk which they have no right to lay at the door of the railroad companies. No company can use effectively coercive powers to keep passengers from doing such things. All persons of sound mind must be held responsible for knowledge of the usual risks of such traveling. Every one is supposed to know that a fall beside a moving train is very likely to bring some part of the body or limbs in danger of being crushed. Every one is supposed to know that, in jumping from a vehicle running six miles an hour or much less, he stands a good many chances of falling or being unable to fully control his movements, and that falling near a train is always dangerous. No doubt every one who tries such an experiment persuades himself that he will escape, but it is impossible to suppose that any one of common sense does not know that there is danger.

It is true that there are circumstances where it is not negligence to take a choice of risks, or where an act is done without freedom of choice But the common sense of mankind teaches us that no one has a right to risk life or limb merely to avoid inconvenience. Upon the facts in this case no one can doubt that the railway agents were wrong in not stopping at the station. If put to any inconvenience by being carried further, Bangs had a legal remedy for it. No doubt the vexation and anxiety would lead to some trouble of mind, but they can not be held sufficient to justify running into bodily danger. If it was negligent to do as Bangs did, the rule of the law deprives him of any redress, because there is here no doubt that it was the immediate occasion of the mischief. The case is a very hard one, and he probably did what some others might have done in his place. But the courts can not allow hard cases to change the rules that they are compelled to administer. And we can not see any possible ground for exempting this case from the rule which makes a plaintiff's negligent contribution to his own injury a defense to an action for damages.

The judgment must be reversed, with costs, and a new trial granted.

GRAVES, C. J., and MARSTON, J., concurred; COOLEY, J., did not sit in this case.

WEEKLY DIGEST OF RECENT CASES.

ADMIRALTY—COLLISION.

Since the act of February 16, 1875, the findings of fact by the circuit court in admiralty are conclusive, and this court can not look into the evidence, which is not properly a part of the record in this court. *Brig Lindsley v. Brown*, U. S. S. C., October, 1881.

ADMIRALTY—MARITIME LIEN FOR SUPPLIES—SUPPLIES MUST HAVE BEEN FURNISHED.

Where there was a corrupt arrangement between a master of a vessel and a merchant who made advances, in pursuance of which the master gave drafts on the owners "recoverable against the vessel, freight and cargo" to the merchant, who indorsed them to innocent holders for value: *Held*, that inasmuch as any lien on the vessel was created by the supplies only, and not by the drafts, the holders of the drafts could not recover against the vessel unless there was a valid debt, as between the original contracting parties, creating a maritime lien independent of the drafts. *Fechtenburg v. Bark Woodland*, U. S. S. C., October Term, 1881.

AGENCY—AGENT'S PERSONAL LIABILITY.

Where a person acts merely as agent and signs papers in that capacity, and the party with whom he deals has full knowledge of such agency and of the principal for whom he acts, an express dis-

closure of the principal's name on the face of the papers is not necessary to protect the agent from personal liability. *Metcalf v. Williams*, U. S. S. C., October Term, 1881.

APPEAL—WHAT IS A FINAL JUDGMENT.

An order made upon a motion for a new trial, overruling it as to part of the verdict and judgment, but sustaining it as to one issue and directing that it be retried, is not such a final judgment as can be appealed from, and an appeal from such a judgment will be dismissed by the Supreme Court for want of jurisdiction. *Linn v. Aramboula*, S. C. Tex. Comr., October, 1881.

ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS.

Communications are not privileged which take place between a solicitor and a surveyor or other third party on behalf of a client before any legal proceedings are commenced or apprehended by, or against the client, in reference to the subject-matter of the communications. *Wheeler v. Le Marchant*, Eng. Ct. App.

CHATTEL MORTGAGE—STOCK IN TRADE.

A chattel mortgage on a stock of goods and fixtures, which provides that the mortgagor may retain possession of the goods and sell them in the ordinary course of trade, using a portion of the proceeds realized for paying expenses and replenishing the stock, and accounting to the mortgagees for the residue, is valid and binding as to the fixtures, at least (68 Ind. 382), and as to the rest of the goods fraud will not be presumed; but the question of its validity depends upon extrinsic facts, outside of the recitals in the mortgage itself. *Lockwood v. Harding*, S. C. Ind., Feb. 16, 1882.

CONTRACT—AUCTION SALE.

Although, in a case where auction sales are required by law, it is illegal to make a private agreement of sale and then go through the form of an auction sale to perfect such agreement, yet it seems that such a sale can be set aside only at the instance of some one interested in having the property bring its full value, and not at the instance of the purchaser; nor can such a purchaser set up such a defense to an action for the purchase-money. *Porter v. Graves*, U. S. S. C., October Term, 1881.

CONTRACTS — MODIFICATION AND ALTERATION OF INSTRUMENT UNDER SEAL.

Any material alteration or modification of a contract under seal necessarily constitutes the specialty part of a new verbal agreement, that can not be enforced by an action of covenant. But the waiver of one or more of the stipulations of a sealed agreement produces no such effect for the waiver, and neither destroys the original contract nor makes a new one, but only affects its execution. *Quigley v. DeHaas*, S. C. Pa., October 3, 1881.

CRIMINAL LAW—MURDER IN THE FIRST DEGREE.

On the night of February 16, 1880, the prisoner and the deceased had a quarrel, the deceased striking the prisoner with a billy and his fist while on the ground. They afterwards shook hands and separated. The next morning the prisoner armed himself with a gun, and shot the deceased, on the street, in the back, just after he had quietly passed him. Evidence was admitted showing that the prisoner had made threats the night before that he would kill the deceased. *Held*, murder in the first degree. *Nevling v. Commonwealth*, S. C. Pa., October 3, 1881.

CRIMINAL LAW—VERIFIED COMPLAINT — AMENDMENT.

A criminal prosecution was commenced before a justice of the peace by the filing of a verified complaint. Pending the proceedings in the justice's court, the complaint was amended, on motion of the county attorney, by a change in the name of the party against whom the crime was charged to have been committed. After such amendment no re-verification was had, the defendant was convicted, appealed to the district court, and there the case went to trial. After the impaneling of the jury the district court permitted the filing of a new and amended complaint, and thereupon such new and amended complaint was filed, duly verified, and the trial was had upon such amended complaint. *Held*, no error. *State v. Hinkle*, S. C. Kan., February, 1882.

CRIMINAL LAW—WHAT IS SWINDLING—DECEPTION.

One of the main ingredients of the crime of swindling is, that the injured party has been deceived by being told, and relying upon that which was false, and the information must so set out. But where the pretense is absurd or irrational, or such as the party injured had, at the very time, the means of detecting at hand, it is not within the act. *Buckalew v. State*, Texas Ct. App., January 28, 1882.

DAMAGES—OBSTRUCTION OF MILL STREAM—MEASURE.

In a suit by a mill owner for damages resulting from the improper use of the stream by those above him, the producing power of the mill and the profits in operating the same when unobstructed by the acts complained of are pertinent facts in fixing the amount of damages. In such a case the measure of damages is the difference between the annual value or use of the mill, unaffected by the unlawful obstruction and as affected by it, and the jury have a right to consider in this connection any special contracts which the owner may have had or been able to obtain. *Horton v. Hall*, S. C. Pa., October 3, 1881.

EQUITY—RELIEF AGAINST JUDGMENT BY DEFAULT.

Where a judgment by default was obtained against a party who intended to make defense, but was informed by the court that cases against parties living in his Congressional district, would be tried at another place in the judicial district than that where the cause was then pending; in consequence of which he made no defense and did not know of the judgment till after the close of the term at which it was rendered: *Held*, that a bill in equity would lie to obtain relief against such judgment. *Metcalf v. Williams*, U. S. S. C., October Term, 1881.

EVIDENCE — EXPERT WITNESS — FRAMING HYPOTHETICAL QUESTIONS.

Counsel, in framing hypothetical questions to put to expert witnesses, are not confined to facts admitted or absolutely proved, but facts may be assumed which there is any evidence on either side tending to establish, and which are pertinent to the theories which they are attempting to uphold. *Dillebar v. Home Life Ins. Co.*, N. Y. Ct. App., November 22, 1881.

FEDERAL JURISDICTION — JURISDICTION OF SUPREME COURT IN ADMIRALTY—FINDINGS OF FACT.

A brig and a schooner are approaching each other nearly end-on, the latter, just before the collision

heading west, by south, the former about east northeast. The wind was east of sou h and fresh. On the discovery of the brig the scho ner p rted, but the brig, on discovering the schooner starboarded, and then ported, but too late to c ange the course given her by the first manœuvre: The vessel collided: *Held*, that the brig was in fault for starboarding, and that such fault was a violation of the sixteenth rule of navigation, and was the cause of the collision. *Brig Lindsley v. Brown*, U. S. S. C., October Term, 1881.

FEDERAL PRACTICE—ISSUES OF FACT IN EQUITY.

Neither party to a suit in equity brought in a Federal court has an absolute right to have a question of fact arising in the cause passed on by a jury. *Herdsman v. Lewis*, U. S. C. C., E. D. N. Y.

FEDERAL PRACTICE—WRIT OF ERROR TO STATE COURT.

A writ of error, in a case where a Federal question was raised, should go to the highest court of the State which had jurisdiction, and not to the court of last resort of the State on all questions, where such latter court had not jurisdiction of this special question. *Lane v. Wallace*, U. S. S. C., October Term, 1881.

GOODWILL OF BUSINESS—SALE—SOLICITING FORMER CUSTOMERS.

The right of a purchaser of a business, together with the goodwill, from the trustee in bankruptcy, does not extend to restrain the bankrupt from *bona fide* commencing a fresh business and from seeking assistance in it from his old friends and customers. *Walker v. Mattram*, Eng. Ct. App., Dec. 21, 1881.

GUARANTY—DISCHARGE OF GUARANTOR BY ACTS OF CREDITOR.

The creditor is not permitted, by wrongful act, to vary the situation, rights or remedies of the guarantor, so as to increase his risk, and still hold him bound for the debt of the principal. However, for the acts of the creditor to have the effect to discharge the guarantor, they must be such as are not authorized or sanctioned by law. *Miller v. Marx*, S. C. Tex. Comr., Nov. 28, 1881.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR ANTE-NUPTIAL DEBTS OF WIFE.

Where, in an action brought against a husband and wife, in respect of a debt contracted by the wife before marriage, judgment has been recovered, and the whole of the assets of the wife received by the husband have been taken in execution, the husband is not liable for a similar debt in an action brought after the writ but before judgment in the other action. *Fear v. Castle*, Eng. High Ct., Q. B. Div.

INSURANCE, LIFE—APPLICATION—CONSTRUCTION.

Where, in an application for insurance, in answer to a question whether he had ever had certain enumerated diseases, answered, "Never sick," an instruction that the jury might, in deciding whether such answer was true or not, take into consideration the fact that the insured imperfectly understood English and the meaning he intended to convey by the answer, was correct. *Knickerbocker Life Ins. Co. v. Trefz*, U. S. S. C., October Term, 1881.

JUDICIARY—DISQUALIFICATION OF JUDGE—BEING OF COUNSEL.

It is no disqualification that the judge had been of counsel in cases involving the same title that is involved in the one under consideration. *Glasscock v. Hughes*, S. C. Tex. Comr., Dec. 10, 1881.

JURY TRIAL—DISQUALIFICATION OF JUROR.

Where a motion for a new trial in a criminal case is made upon the ground that one of the jurors had not resided six months in the State, and therefore was not an elector or qualified juror, and the affidavits in support of the motion simply show the f ct of such disqualification, and that it was unknown to the defendant until after the verdict, and it does not appear from the record that any preliminary examination was made of the juror as to his qualifications, or that he made any false statements with respect thereto, or that any fraud or impost on was practiced upon the defendant, or even that the defendant's counsel was at the time of the impaneling of the jury ignorant of such disqualification: *Held*, no error to overrule the motion. *State v. Hinkle*, S. C. Kan., February 15, 18 2.

LANDLORD AND TENANT—BREACH OF COVENANT—NT.

here a landlord leases premises to a tenant for the y on of a certain business, and covenants nat he will not, during the term of the lease, le se oth r adjacent premises to other parties for the carrying on of a similar business, a breach of the covenant by the landlord is not a forfeiture of the right to the rent. The tenant injured by such breach of covenant is not entitled to set off his damages in replevin upon a distress for rent levied by the landlord, but may have a reduction of the amount of the rent, proportioned over the whole period of the lease. *Allegaert v. Smvrt*, S C Pa., January 18, 1882.

LIMITATIONS—CONTINUOUS POSSESSION.

It is a well recognized doctrine that the fact of the premises being left without an occupant for a short time, between the removal of one tenant and the entry of his successor, where there is no intention of abandoning the possession, does not stop the running of the statute. *Rushing v. Chandler*, S. C. Tex. Comr., October, 18 .

LIMITATIONS — TITLE TO LAND — ACKNOWLEDGMENT.

Where title to land has been acquired by adverse possession for the statutory period, an acknowledgment given, after such period has expired, to the former owner is not sufficient to take the case out of the statute of limitations. *Sanders v. Sanders*, Eng. Ct. App., November. 1881.

NATIONAL BANK—TAXATION OF FOREIGN INVESTMENTS.

Under section 3408 of the Revised Statutes of the United States, it is lawful to tax the capital of a bank, even if invested abroad and in foreign countries, it not appearing in what character of property, real or personal, the inve ments were made. *Nevada Bank v. Sedgwick*, U. S. S. C., October Term, 1881.

NEGLIGENCE — KILLING STOCK BY RAILROAD TRAINS—STATUTORY LIMITATION OF LIABILITY.

If the tatute limits the liability of railroad compnie in respect to fencing their roads to those having an interest in the land adjoining the place where their cattle go over such fence on the road and are killed or in ured— uestion ich we do not decide—then the language of the statute extends their liability to the occupants as well as the owners of such lands. *Veerhusen v. Chicago, etc. R. Co.*, S. C. Wis.

NEGLIGENCE—MASTER AND SERVANT.

It is the duty of the master to inform the servant of facts in his knowledge affecting the safety of th

servent in the service to be performed, when the latter is ignorant of them. *McGowan v. La Plata Min. and Sm. Co.*, U. S. C. C., D. C. . January 1, 1882.

PARTNERSHIP—NEGOTIABLE PAPER—BONA FIDE HOLDER.

Where one of two partners fraudulently indorses the name of the partnership upon commercial paper in which it had no property or interest, and obtains money upon it from the indorsee for a purpose clearly outside the scope of the partnership business, the indorsee has no claim against the other of the co-partners. *Newman v. Richardson*, U. S. C. C., E. D. La., June, 1881.

PARTNERSHIP—REAL ESTATE.

Real estate owned and held by copartners as partnership property, and brought into the firm stock, is not converted absolutely and for all purposes. It is to be treated as personalty, in so far as may be necessary to secure the payment of the firm debts and advances made by the partners respectively, but for every other purpose it remains real estate. *In re Codding*, U. S. D. C., W. D. Mo., Dec. 21, 1881.

STATUTORY CONSTRUCTION—SPECIAL AND GENERAL INCORPORATION.

Held, that the powers granted to a corporation by a special act, are not repealed by a general law authorizing the incorporation of companies with similar powers to those contained in the special act. *Black River Imp. Co. v. La Crosse Booming and Trans. Co.*, S. C., Wis.

STATUTE OF FRAUDS—PURCHASE OF LAND AT SHERIFF'S SALE.

Where the agreement is so far performed that the purchaser acquires perfect title and full possession of the property, the vendor may recover the stipulated price. 71 Ind. 562. Browne Stat. Frauds, sec. 117. The execution of the contract is none the less complete because the title passes by the sheriff's deed instead of by the conveyance of the party. 75 Ind. 485. Implied promises to pay the value of the property obtained, are not within the Statute of Frauds. Brown, sec. 124; 18 Ind. 123. The statute can not be made the means of perpetrating a fraud. *Arnold v. Stephenson*, S. C. Ind., Feb. 17, 1882.

LEGAL EXTRACTS.

SYSTEM IN DIGESTS.

Our contemporaries, the *Albany* and *Central Law Journals*, are discussing who is entitled to the credit of first suggesting a uniform method of indexing and digesting the law. If they look a little farther back they will come to the suggestions of the *Daily Register*, that long since pressed this subject on the attention of the profession. While waiting for that convention of reporters to be held, we will give one simple rule for a beginning, the adoption of which would put an end to a good part of the errors and diversities now in vogue—*viz.*: A principal title should never begin with an adjective. The only exception is of such phrases as are practically compound words, so well known as titles in the law, that they are used, adjective and all, for the titles of books. The law of "Specific Performance" is properly indexed and digested under that name, because that is the well known, universally received title of a separate branch of equity; and books on it, such as Fry on Specific Performance, Pomeroy on Specific Performance, manifest the universal readiness of the profession to look under such a head. The subject would only be hid away if treated under "Performance (specific)," or under "Contracts." But specific objection, specific exception, specific covenant, are against the rule, because these are not known branches of the law; but the word specific is here a mere adjective qualifying a subject which should be treated under Trial, or Exception, or Covenant. "False Imprisonment," and "False Pretenses" are other illustrations where indexing under a title beginning with an adjective is not only allowable, but appropriate and necessary. But False Testimony or False Warranty are not allowable titles, because no lawyer wishing to find the cases on evidence or sales would think of looking under "false." If index makers would go through their lists of titles and strike out all those which begin with an adjective, unless they can find a law treatise has been written with that as a title, they would take a long step towards the desired improvement, and would confer a great boon on the profession. Another simple rule is, that in successive volumes the same titles should be preserved; with additions it may be, but without any other alterations than those considerately and deliberately adopted. If these two rules should be put in force by official reporters throughout the country, nearly half the existing difficulties would disappear, and the feasibility of securing harmony by conference and agreement would be greatly increased.—*New York Daily Register.*

NOTES.

——In Muse v. Muse, 84 N. C. 35, it was held that "a husband is not excused from the maintenance of his wife because he lacks an estate. He must labor, if need be, for her support." "The court adopted the very minimum that an able-bodied man can earn, ten cents a day."

——A colored man, arraigned for passing counterfeit money, justified himself by the following plea: "Well, massa, I never was positive about dat ar bill. Some days I tink it was a bad bill; 'er days I tinks it was a good bill; so one o' dem days when I tinks it was a good bill, I jes' dun gone and passed it."